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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1265

WILLIAM B. SAXBE, ATTORNEY GENERAL OF THE UNITED STATES, AND NORMAN A. CARLSON, DIRECTOR, UNITED STATES BUREAU OF PRISONS, PETITIONERS

v.

THE WASHINGTON POST CO. AND BEN H. BAGDIKIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Supp. Pet. App. F, 3-26) is unreported. The district court's opinions of April 5, 1972 (Pet. App. A, 13-28) and December 19, 1972 (Pet. App. B, 29-36) are reported at 357 F. Supp. 770 and 779. The court of appeals' order of September 6, 1972 (Pet. App. C, 37-39) is reported at 477 F. 2d 1168.

JURISDICTION

The judgment of the court of appeals (Supp. Pet. App. F, 3–26) was entered on February 21, 1974. A petition for a writ of certiorari before final judgment was filed on February 15, 1974. A supplemental petition for a writ of certiorari was filed on February 22, 1974, after the court of appeals entered final judgment, and certiorari was granted on March 4, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the policy of the federal Bureau of Prisons prohibiting press representatives from conducting individual face-to-face interviews with federal prisoners violates the First Amendment.

CONSTITUTIONAL AND POLICY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Bureau of Prisons Policy Statement No. 1220.1A (February 11, 1972) provides in part:

> § 4b(6). Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not

to be made public, if it is limited to the discussion of institutional facilities, programs and activities.[1]

STATEMENT

1. This action, brought by a newspaper and one of its reporters on March 10, 1972, challenges as unconstitutional a provision of a Bureau of Prisons policy statement prohibiting personal interviews of inmates. (Policy Statement No. 1220.1A, § 4b(6), Pet. App. D, 40-45, 42). The Policy Statement was issued on February 11, 1972, after a review by the Bureau of Prisons of its previous policy relating to inmate-press communication. That previous policy, one of longstanding duration but first formally stated in a policy statement issued in 1960 (App. 71-73), prohibited all communication between inmates and the press.

The review was conducted to determine the appropriateness of that policy in light of current social and prison conditions, and particularly contemporary jurisprudential developments (App. 211-212, 224). The review included consultations with administrators of state systems and a several day conference in Washington with institutional wardens from throughout the federal system. The objective of the review was to develop a policy compatible with the responsibilities of the system for the internal control and supervision of the institutions (App. 211-212).

In this review explicit consideration was given to permitting face-to-face prison interviews. Indeed, a proposed interview policy was drafted, circulated and

[1] Policy Statement No. 1220.1A is reprinted in its entirety, Pet. App. D, 40-45.

extensively discussed within the Bureau of Prisons system and with administrators of state prison systems (App. 269-275, 280-281). After this extensive process of review and consultation, the Director of the United States Bureau of Prisons determined that a policy permitting such interviews would not be compatible with the sound administration of the federal prison system (App. 75-76, 280-281). Instead, he promulgated a new policy statement continuing the prohibition of interviews, but changing the policy relating to inmate mail to permit uncensored press-media communication by means of letters (App. 75-77).

The dilemma with which the Bureau of Prisons has grappled in the formulation of its press-inmate communications policy has been the conflict between the desirability of a policy generating information for the press and the belief, supported by the experience of prison administrators, that certain kinds of inmate-press communication, particularly when in the form of interviews, can lead to serious security, disciplinary, and morale problems within prison institutions (App. 217). If all interviews are permitted, then those inmates who through the press call for prisoner rebellion and resistance have their influence increased and magnified (App. 217). If some interviews are to be permitted and others denied, institutional wardens will be required to make subjective and necessarily arbitrary decisions concerning a privilege of importance to inmates (App. 218).

"[T]he problem we have," testified Mr. Norman Carlson, Director of the United States Bureau of

Prisons, "is how we can develop a policy and procedure which are not arbitrary left in the hands of the warden * * * [and] which would not at the same time permit the very negative, hostile, anti-social individual from developing himself into a very negative force within the institution? That is the problem we are grappling with; we did grapple with" (App. 218-219).

The proposed policy statement of the Bureau of Prisons authorizing interviews would have permitted all interviews requested by the press and desired by the inmate without regard to their content or effect, but would have subjected those interviews to detailed constraints as to number, time, recording, availability to other journalists, and so on (App. 271-275). The Bureau finally decided, however, that such a uniform policy would be incompatible with the sound administration of the prison system and that a non-uniform interview policy would present insuperable problems of perceived unfairness and constitutionally inappropriate content regulation. It decided, instead, to permit unlimited communication between inmates and the press by means of uncensored letters and to continue the absolute prohibition of face-to-face interviews of inmates (App. 75-77, 280-281).

2. On April 11, 1972, after an evidentiary hearing, the district court entered an order (Pet. App. A, 26-28) declaring that the prohibition of press interviews with federal prisoners was unconstitutional. The district court found that the Bureau's decision had been made "only after serious deliberation and study." It

summarized the considerations in support of the Bureau's policy as follows (Pet. App. A, 18–19):

> (1) Excessive press attention to a relatively few notorious prisoners has detracted measurably from their rehabilitative treatment and imposed administrative difficulties.
>
> (2) When press interviews are held they receive immediate wide attention throughout the prisons and the importance of the prisoner interviewed is exaggerated among other inmates. Thus prisoners receiving wide press attention may become "big wheels" and have their status within the prison community enhanced to a point that seriously interferes with effective discipline. *Neale* v. *Manson*, 326 F. Supp. 137 (D. Conn. 1971).
>
> (3) A few prisoners may use the medium of the press to foster revolt within the walls. All news that goes out comes back in by newspaper, television and radio. Angry words, false accusations and protest geared to violence can light a fuse that erupts the pent-up emotions of inmates who may feel neglected and abused.

The district court concluded that "[t]hese are all real considerations and while somewhat impressionistic, they are supported by experience and advanced in good faith" (Pet. App. A, 19). The court held, however, that the prohibition was unconstitutional because "[i]t is possible to prevent the difficulties and excesses feared by far less restrictive measures" (*ibid.*). The court declared: "[U]nder the First Amendment, subject to reasonable restrictions as to time and place, the press has a right of access to interview con-

fidentially and without censorship any inmate of a federal correctional institution who consents to be interviewed, except where it is determined that serious administrative or disciplinary problems are likely to result from the particular interview sought" (Pet. App. A, 27).

The district court and the court of appeals refused petitioners' requests for a stay pending appeal. On May 12, 1972, this Court granted a stay pending appeal (406 U.S. 912).[1]

The court of appeals in September 1972 remanded the case to the district court for reconsideration in light of *Branzburg* v. *Hayes*, 408 U.S. 665 (decided June 29, 1972) and directed it to make specific findings on a number of issues, including the necessity of personal interviews and the justifications for the interview ban of Policy Statement No. 1220.1A (Pet. App. C, 37–39).

After an evidentiary hearing on November 21–22, 1972, the district court filed a supplemental memorandum in which it adhered to its previous order and judgment (Pet. App. B, 29–36). The court found, on the basis of the evidence, that petitioners "have not imposed a news blackout on events and conditions at federal prisons, as the plaintiffs have alleged in their papers," and that "[t]he sources of information about federal prisons * * * which are available to the news media under Policy Statement 1220.1A enable newsmen to obtain some information about events and

[1] In accordance with the order of the district court, the Bureau of Prisons on May 8, 1972 authorized respondents to interview seven inmates at Lewisburg.

conditions at federal prisons" (Pet. App. F, 51, incorporated by reference at Pet. App. B, 36).

The court also concluded that "accurate and effective reporting of news about prison conditions and events and prisoner grievances has a critical dependence upon the opportunity for face-to-face interviews with inmates" (Pet. App. F, 57, incorporated by reference at Pet. App. B, 36). The court interpreted *Branzburg* to hold that "news gathering qualifies under the First Amendment and newsmen must be afforded some protection for seeking out the news lest freedom of the press be eviscerated," and further to hold that the press's putative First Amendment right of access to news sources "can only be infringed when the Government demonstrates a 'compelling' or 'paramount' need" (Pet. App. B, 33). The court concluded that the policy considerations advanced by the Bureau "totally failed to demonstrate any 'compelling' or 'paramount' need" for the "absolute ban" of interviews (Pet. App. B, 34). Accordingly, the court reaffirmed its earlier decision.

The parties thereafter filed supplemental briefs with the court of appeals, which heard oral argument and took the case under submission on July 24, 1973. While the case was still pending in the court of appeals, this Court noted probable jurisdiction in *Procunier* v. *Hillery*, No. 73-754 (January 7, 1974), and *Pell* v. *Procunier*, No. 73-918 (January 21, 1974), which present issues closely related to those involved here. Accordingly, on February 15, 1974, petitioner filed a petition for a writ of certiorari before judgment.

On February 21, 1974, while our petition was pending in this Court, the court of appeals issued its decision, affirming the judgment of the district court, with some modification (Supp. Pet. App. F, 3-26). The court of appeals held that the "[r]ight of access by the press to newsworthy events is necessarily antecedent to its First Amendment right to publish. Obviously, excessive limitations on the ability to gather information would render the freedom to publish a hollow guarantee" (Supp. Pet. App. F, 10). The court agreed with the district court "that personal interviews are essential to effective news reporting in the prison environment" (Supp. Pet. App. F, 14) and it framed the central issue in the case as whether the Bureau's interview ban was overbroad. The court concluded that "while we do not question that the concerns voiced by the Bureau are legitimate interests that merit protection * * * they do not, individually or in total, justify the sweeping absolute ban that the Bureau has chosen to impose" (Supp. Pet. App. F, 23).

The court of appeals discussed at length the remedy proposed by the district court. "What is contemplated by both the District Court and this court is not that prison administrators conduct a trial, or even an abbreviated administrative hearing" (Supp. Pet. App. F, 25). Rather, the court of appeals viewed the district court order as requiring that "administrators of the federal correctional institutions make individual judgments based on their perceptions of the current requirements of their institutions, and the likely effect of a particular interview on the proper functioning of

the institution. Admittedly, this will occasionally require them to make difficult decisions. But, when First Amendment rights of the press and the public weigh in the balance, such decisions are inescapable" (Supp. Pet. App. F, 20). The court of appeals modified the order by eliminating the requirement that the individual prison administrator make a decision on the basis of the "probability" that serious problems would be caused by the grant of an interview (*ibid.*).

SUMMARY OF ARGUMENT

I

The Bureau of Prisons' policy prohibiting personal press interviews with individual inmates is reasonably designed to further sound objectives of prison administration. The ban on such interviews, part of the Bureau of Prisons' overall public information policy set forth in Policy Statement No. 1220.1A, is justified by three considerations. First, interviews create an incentive for and are likely to lead to newsworthy rhetoric and disruptive behavior situations in the prisons; second, the granting or denying of interview requests on an individual basis would itself lead to disruptive situations; and third, a uniform policy is necessary. The Bureau's ban on personal interviews was adopted by the Bureau of Prisons only after extensive consultation with the senior officials of the Bureau of Prisons and administrators of state penal systems. After such consultation, the Director of the Bureau of Prisons determined that in his judgment, based upon his and his staff's familiarity with federal prison conditions,

these factors made a policy permitting such interviews unwise.

Individual press interviews with some inmates will cause them to become leaders within the institutions, exercising influence over other inmates, and if their message is disruptive, it will cause morale and disciplinary problems within the prisons. In the institutional life of the prison, the media plays an important role in the life of inmates. A reporter coming to interview a particular prisoner is a significant institutional event. Inmates desiring media attention and who were not known before their incarceration may conclude that the path of militance and disruption is the only way to gain press attention. The possibility of interviews with the press increases the incentives for such conduct. Although many such interviews may not lead to difficulty, it is difficult to predict in advance which ones will and which ones will not, because of the complexity of the human reactions involved.

If prison officials must decide on a case-by-case basis what interviews to grant and what to deny in terms of the anticipated effect of the interview on the proper functioning of the institution, they will be required to make difficult subjective judgments. Prisoners known to harbor hostile and critical views about prison conditions are likely to be denied interviews, while prisoners considered sympathetic and friendly will be granted permission. This pattern is likely itself to further morale and disciplinary problems in the institution. The record contains a number of examples showing various interviews that have in fact

been harmful to the functioning of prisons, both in the federal system and in a number of state systems.

Although some interviews could with confidence be permitted without fear of difficulty, there are important considerations of penal administration supporting a uniform prohibition. Equality of privileges is an important tenet of correctional administration if not correctional justice. Inmates view press access as a privilege. If decisions are made on an interview-by-interview basis, it is inevitable that militant members of minority groups will be denied interviews more frequently than others. Members of these groups will consider this unfair treatment and this will in turn contribute to severe morale and disciplinary problems within the institution.

These considerations are important not only within a single institution but within the federal prison system itself. Because of frequent transfers, prisoners are fully informed about the entire system and view it as one. Differences in treatment between institutions would contribute to difficulties upon transfer because a prisoner transferred to an institution in which media access is largely denied would consider this one more proof of the unjust motives for his transfer. The complex and far flung nature of the federal prison system makes supervising any discretionary policy to assure that it is properly administered difficult and time-consuming.

II

The Director of the federal Bureau of Prisons has broad discretion in operating the prison system and

the courts exercise only limited review of his actions. The formulation of public information policy is a matter within his authority, conferred upon the Attorney General by statute and delegated to the Director by regulation. Courts have uniformly held that supervision of inmates of federal institutions rests with the proper administrative authorities and that courts have no power to supervise the management and disciplinary rules of such institutions.

This broad discretion of the Attorney General is comparable to his wide authority to exercise the plenary congressional power to exclude aliens. In *Kleindienst* v. *Mandel*, 408 U.S. 753, the Court declined to look behind the Attorney General's exercise of that discretion to exclude an alien for a facially legitimate and bona fide reason even though the exclusion interfered with the desire of American citizens to communicate in person with him.

The decision by the Director to prohibit inmate press interviews is within the scope of his discretion, because such interviews would cause serious problems in the prison system, as explained at length in Part I. The Director's decision does not amount to a blackout of information about the prison system, and in fact the record shows that a great deal of information about the federal prison system is readily available to the press. The policy does not discriminate against the press because the press seeks a right not available to the public generally and because the difference in treatment between the press and other visitors such as friends and attorneys is based upon sound considerations of penal administration.

The denial of inmate press interviews does not violate the First Amendment. The decisions of this Court teach that government action does not violate the First Amendment merely because it does not facilitate the press's performance of its function to the maximum extent possible. Thus, in *Branzburg* v. *Hayes*, 408 U.S. 665, the Court held that compelling a reporter to testify before a grand jury about information obtained in the course of his professional activities did not violate the First Amendment, even though such testimony might have an impact on the willingness of some sources of information to communicate freely with him.

The denial of press interviews with inmates does not unconstitutionally abridge the freedom of the press because of the sound justifications for the denial and because other sources of information about the federal prison system are available. This is not a case involving the rights of the press to publish and circulate free from government control. There is no claim that the Bureau of Prisons has attempted in any way to prevent respondents or other members of the press from freely publishing or circulating any reports concerning prison conditions and prisoner complaints. The only issue here is whether the First Amendment gives the press the right to use a particular technique of news gathering—the confidential personal interview—inside the walls of federal prisons.

If the First Amendment is construed to give "the press" a right to interview prisoners, there will be serious and difficult questions of interpretation and application. The "press" is not a clearly defined, iden-

tifiable group, but a vague and broad concept. Granting confidential prisoner interviews to every person with a plausible claim of an intent to write would create an intolerable situation for the federal prison system. The decision of the court of appeals will require the Bureau of Prisons and ultimately the federal judiciary, to determine which prospective writers and speakers have First Amendment rights of access and which do not. This Court cautioned against the dangers of such a path in *Branzburg* v. *Hayes*, 408 U.S. 665, 703–704. Further practical problems of definition and application will follow. Can the television journalist enter to conduct interviews? What about other journalistic techniques designed to capture and compellingly report the truth?

Although the courts below found that interviews are essential to effective news reporting in the prison environment, that conclusion is questionable on the present record. The testimony of Arthur Liman, General Counsel of the New York State Special Commission on Attica, shows that private interviews with prisoners are essential to get the truth, and other parts of the record show that press interviews with inmates in prisons will not be private. The prison is a society in which inmates face sanctions and rewards not just from the administration but from other inmates, and statements likely to be publicly reported will be made with that fact in the forefront. The courts should not become involved in this process of determining which journalistic techniques are essential and which are not.

The decision of the court of appeals improperly requires that a problem best left to the flexibility inherent in informed administrative discretion be addressed only within the framework of constitutional adjudication. Courts should not freeze the necessarily dynamic process of interaction between the press and the administrator into a constitutional holding.

ARGUMENT

I

THE BUREAU OF PRISONS' REFUSAL TO PERMIT PERSONAL PRESS INTERVIEWS WITH INDIVIDUAL INMATES IS REASONABLY DESIGNED TO FURTHER SOUND OBJECTIVES OF PRISON ADMINISTRATION

Both the district court and the court of appeals agreed that the harmful effect of some press-inmate interviews justifies a prohibition of all interviews that are thought to have such effect. The two courts differed, if at all, only as to the showing required to support a denial. The courts, however, concluded that a ban on all interviews was not justified. We submit to the contrary that the record fully justifies the ban. It is supported by the following considerations: (1) interviews create an incentive for and are likely to lead to newsworthy rhetoric and disruptive behavior by otherwise orderly inmates; (2) the granting or denying of interview requests on an individual basis would create serious problems for prison officials and would be likely to lead to disruptive situations in the prisons; (3) the need for a uniform policy.

A. Interviews create an incentive for newsworthy rhetoric and are likely to result in disruptive behavior.

Mr. Carlson testified that a policy permitting interviews "* * * would give notoriety to those individual inmates and cause them to become leaders, so to speak, in the institution. As you know, an institution is a total community, and when some inmates receive a great deal of attention, be it from the press or other means or other parts of our society, they do tend to rise up into a leadership role. At times, this can have a very negative effect on the institution and the environment of the institution" (App. 217).

Mr. Carlson also stated that there would be "much less notoriety" in connection with correspondence between a newsman and an inmate than "where the press actually makes a trip, frequently many miles, to an institution, and the inmates in the institution immediately know that the press is present and there for one purpose, and that is to interview this one particular inmate" (App. 220-221). This assessment was shared by Lou V. Brewer, Warden of the Iowa State Penitentiary, who testified that there was more of a problem with face-to-face interviews than with interviews by correspondence. The district court asked Warden Brewer (App. 440):

> So that if a newspaper got a letter from one of these leaders, or Big Wheels, or whatever you call them, and it was published in full text on the front page of the local paper, and it came back into the prison, that wouldn't have any real effect on the man's stature? It

> wouldn't influence it at all? It would be only if he had talked to the man?

Warden Brewer replied (App. 440):

> We have had that thing to [sic] happen and it didn't seem to have any great effect on the general climate of the institution, as did the interview situation.

Warden Brewer further stated that when the press comes into an institution to conduct an interview, that fact becomes known to the inmate population at large "almost immediately" (App. 440).

Mr. Carlson's appraisal of the effect of allowing face-to-face interviews was supported by the testimony of Noah L. Alldredge, Warden of Lewisburg Penitentiary (App. 175–176); John J. Norton, Warden of Danbury Penitentiary (App. 199–200); Lee V. Brewer, Warden of the Iowa State Penitentiary (App. 436, 439); Louis L. Wainright, Director of the Division of Corrections of the State of Florida (App. 422–423); and Raymond K. Procunier, Director of Corrections for the State of California. Procunier stated that, at one time, California permitted the press to conduct interviews with prison inmates, but that this policy had been discontinued because of damaging experiences which resulted from such interviews (App. 155–157, 159–160).[4]

The conclusion of the courts below that these ad-

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[4] As an example, Mr. Procunier noted the case of Donny Jackson, who was "relatively unknown" outside the prison until press interviews helped make him "more and more notorious" (App. 156–160).

verse effects could be dealt with on a case-by-case basis rests upon a simplification of what, in the jargon of this case, has become known as the "big wheel" phenomenon. The court of appeals described it as follows (Supp. Pet. App. F, 16–17):

> [P]ress interviews with "big wheels" tend to increase their visibility and status in the prison community. This, in turn, encourages the negatives and hostile elements of the prison population by enhancing the "big wheel's" ability to encourage other inmates to follow disruptive paths.

Based upon this theory of the Bureau's interview ban, the court of appeals held that application of the interview ban to all inmates makes it overly broad. This reasoning ignores two important additional considerations.

First, and most importantly, the availability of interviews itself generates an incentive for newsworthy behavior, and in prisons newsworthy behavior is often destructive behavior. As Mr. Carlson explained: "Based on my experience in institutions and from being in the central office in Washington, there is a very small segment of the inmate population that is of any interest at all to the press. The notorious inmates, of course, have already been well documented. [Those famous prior to incarceration.] * * * At the same time, the press is interested in some of the more hostile, militant inmates that do present problems in terms of management and control of the institution" (App. 219). Thus for the inmate who does not bring his fame with him to the gate, the only likely road to press attention is a disruptive one.

The record shows that inmates have a strong interest in the media, which is not fully reciprocated. The printed page and television program enter the prisons freely, with practically no censorship (Federal system: App. 185, 200; California system: App. 158–159; Massachusetts system: App. 330–340). There they play an important role in the life of inmates. As the district court found, "Newspapers, magazines, radio and television programs pour in incessantly throughout the day" (Pet. App. 11, 32). Noah L. Alldredge, Warden of the United States Penitentiary at Lewisburg with an average inmate population of 1850 (App. 172–173), testified that on a single day 88 letters were set out to the press under the Bureau's open mail policy (App. 181). John J. Norton, Warden of the federal correctional institution at Danbury testified that "I know that many letters have gone out [to the news media]" (App. 204). The report of the New York State Special Commission on Attica graphically documents prisoner fascination with the media:

> The admission of newsmen and television cameras to D Yard, not only provided inmates with an unparalleled opportunity to tell the public about prison conditions, but gave them a sense of importance, dignity and power. Inmates realized that they could command national attention only as long as they kept the hostages and that once the uprising ended they would return to the status of forgotten men, subject to all these humiliations of prison life. That feeling, coupled with their fear of reprisals and mistrust of the State, made it almost impossible to persuade them to give up

the limelight and return to anonymity. [App. 300.][1]

John Boone, Commissioner of the Massachusetts State Department of Corrections, described an incident at the state institution for women at Framingham. A peaceful disturbance was ended by a press conference. "And after they had their statement before the press, they felt very proud of themselves and it was practically over. * * * They liked to see themselves on television. So they tried for some more. But she [the Superintendent] cut it off" (App. 344). Boone attributed this behavior to the fact that the inmates were women, but he was probably being facetious.

The record also shows, however, that the press does not have the same degree of interest in the individual inmate that the inmate has in the press. Benjamin Malcolm, Commissioner for the New York City Department of Corrections, which follows an open access media policy (App. 123–129), testified that requests for interviews have not "been frequent at all" (App. 131), and that there had been no requests to interview sentenced inmates (App. 138). Leroy Anderson, Ex-

[1] Mr. Idman, General Counsel of the Commission, testified that in his view the press should play a role in prison life through interviews conducted at times other than during an institutional disturbance. He was, however, talking about "private interviews where people are not under the pressure of making speeches to please their fellow-inmates or the institutional administrators" (App. 301). The press interviews sought here will not be conducted under such conditions, even if the inmate's name is not revealed in the story (App. 185–186, 222, 486). The relevance of Mr. Idman's views to this case are discussed further, *infra*, pp. 52–55.

cutive Assistant to the Director of the District of Columbia Department of Corrections, testified that under the interview policy of the Department he knew of only three requests for interviews (App. 147). John Hanne of Massachusetts testified that interviews are "not that frequent anyway" (App. 332) and explained, "The press is looking for something too often to sell newspapers" (ibid.).

As Warden Aldredge explained, when naked short media interest in famous inmates such as Jimmy Hoffa as opposed to the interest in the average inmate, "Well, naturally, there is a great difference. There is more interest in the person who is well known. And the other, usually the person of interest to news media then would be the person who has been involved in some kind of serious incident in the institution" (App. 180). Indeed, this very litigation began with a request to interview inmates involved in disturbances (App. 4).

Secondly, the theory of the court of appeals overlooks the fact that it is impossible with any precision to predict the behavior of inmates. Thus an inmate upon gaining access to the press may then become a source of difficulty, in part because of the impact of the interview on his and fellow inmates' perception of himself.

As Peter B. Hoffinger, Director of Corrections for the State of Illinois, explained in describing Illinois' discretionary policy, "[w]e are in a field that is imprecise at best" (App. 330). Hoffinger described an incident under Illinois' discretionary policy where a warden permitted an interview with a member of the

Black Panther Party, a mistake in Hemingway's view because it led to difficulties in the prison (App. 542), "I might not have granted that particular individual an interview with that particular inmate at Vacaville. * * * But it was the judgment of the superintendent at that time that he thought it could be helpful without that. You know, maybe he didn't anticipate the results of the writing" (App. 545).

B. *The granting or denying of interview requests on an individual basis would create serious problems for prison officials and would itself be likely to lead to disruptive situations in the prisons.*

If Bureau of Prisons officials were required to approve or disapprove press interviews with a particular inmate on the basis of its anticipated effect, these decisions would create serious problems in the administration of the prisons.

Since there is no way prison officials can predict with certainty what interviews will cause difficulties, prison officials will have to make a judgment on what the prisoner is likely to say, how the press is likely to treat his statements, and what effect his statements thus treated is likely to have within the prison. It is probable that prison officials' decisions will depend upon their own estimate of how "harmful" or "beneficial" to the prison the particular interview is likely to be. Prisoners known to harbor hostile and critical views about prison conditions are likely to be denied interviews, while prisoners considered sympathetic and friendly to the prison administration will be granted permission. The consequence is likely

to further morale and disciplinary problems in the institution.

The record shows the problems that this approach to interviewing prisoners would cause. Peter B. Bensinger, then the Director of Corrections for the State of Illinois, testified at length (App. 525–572) about the policy he had promulgated, under which the decision whether to grant interviews was made by the "chief administrative officer" of each institution, taking into consideration a number of factors, including "the interests of the institution and Department" (App. 568). Bensinger described two cases which had created problems. In one, an interview was permitted with Bobby Rush, Defense Minister for the Black Panther Party. "That resulted in an inflammatory article which I objected to, which caused considerable tension on the grounds of the institution, and considerable problems with our staff, and had a number of incarcerates. And as a result of this, we had to transfer him and did, and he was not granted more interviews" (App. 542). The other case, in which an interview was denied, involved an inmate named Kelly Paton (App. 554). This prisoner "had gotten a name for himself, developed a name for himself as leader of certain militant forces and factions, and when received at Menard might have continued to communicate with the general public in the same militant fashion as a result of—and through the course of an interview" (App. 555).

In each instance the result undoubtedly was to create problems with respect to both the particular inmate involved and broader segments of the prison population. Rush probably believed that his transfer

was punishment for what he had said, and other members of the Black Panther Party undoubtedly viewed the transfer as directed against their organization and reflecting hostility toward it by the prison administration. Similarly, Paton and his friends and supporters no doubt believed that the denial of an interview to him was unfair and constituted discriminatory treatment because of the views he espoused.

Incidents related by officials in charge of three different institutions—the federal penitentiary at Terre Haute, the Iowa State Penitentiary, and the Florida system—further indicate the difficulties created by a system under which local prison officials are given discretion to decide whether to permit particular interviews.

Noah L. Alldredge, Warden of the federal penitentiary at Terre Haute (having been transferred from Lewisburg), testified about an incident where he permitted, in his view mistakenly (App. 380), a representative of Congressman Ronald Dellums to interview four prisoners (App. 370-378). Alldredge did not trust the representative because he had earlier been permitted to tour the institution at Lewisburg, but he did not "give my response to the allegations made in any news media after that" (App. 377). Alldredge concluded that he should permit the representative to speak to the prisoners because he was under the auspices of a Congressman (App. 380).

The interviews led to stories in the press, and the stories led to disturbances at the prison. The first story read in part as follows:

> An independent committee concerned with penal reform said today some of the nation's prisons are hot beds ready to erupt into strikes and possible riots. George J. Mitchie, a former convict and member of the National Coordinating Committee for Justice Under Law said one of the worse was the U.S. penitentiary at Terre Haute, Indiana, and unless somebody steps in and does something there may be another Attica there. Mitchie told a news conference, "that is a real hell hole—shocking, what we run into in these places." He declined to discuss Terre Haute further until the committee hears first from the Bureau of Prisons to which it has sent a report. Mitchie and Frank Calahan, another former convict and committee member have visited prisons and consulted with Mr. Ronald V. Dellums, Democrat of California, and interviewed inmates and administrators. [App 379.]

Warden Aldredge denied the story, and further media coverage followed. Aldredge found the local television coverage of his denial done "quite well" (App. 387). Nevertheless, a work stoppage occurred at the institution (App. 384–385).

The district judge considered this example irrelevant because the Congressman's representative was "known to be irresponsible" and should therefore have been denied access (App. 381).[1] But certainly government officials, either in the executive branch or the courts, should not attempt to decide who is an "irresponsible" journalist, and on that basis deny

[1] The order of the district court does not explicitly permit the Bureau of Prisons to consider the reputation or credentials of the person seeking the interview (Pet App. A, 23).

him an interview. The assumption of such governmental discretion would pose First Amendment problems. See *infra*, pp. 48–52.

Len V. Brewer, Warden of the Iowa State Penitentiary, described a situation that had arisen under Iowa's policy of discretionary interviews. After a preventive general lockup in November of 1971 (App. 431–432), the Warden received requests from major Iowa newspapers for interviews with prisoners who had been placed in segregation (App. 432). The Warden denied the interviews (App. 433), but the Governor's office reversed him (App. 433–434). The interviews took place, and they prolonged the difficulties within the prison (App. 436). As Brewer explained: "The inmates who were involved in the interviews, who contradicted our reason for having taken the action, seemed to gain stature with their peers; and much conversation then ensued around the institution, it was a heightening of tension among both inmates and staff * * *" (*Ibid.*).[1]

The district judge also considered this example irrelevant: "[W]hat has this got to do with the case before me? * * * This gentleman has described what happened when a Governor intervened over the judgment of the penitentiary officials, forcing the breaking of a reasonable rule" (App. 437). Realistically, however, it is not unlikely that if the press is denied such interviews, it will seek—sometimes successfully—to overturn the denial by approaching higher offi-

[1] After the incident, Warden Brewer has granted further interviews, but only those of "a human interest nature" (App. 441).

cials. Once there is discretionary authority to grant or deny such interviews, there is always the danger the denial of an interview will be reversed by an official who is not as aware of, or as sensitive to, the problems the interview would create as the local prison official who made the decision.

Another similar incident was recounted by Louis L. Wainwright, Director of the Florida Division of Corrections. He received a request from Les Whitten, an investigative reporter for the Jack Anderson column, to visit the Florida State Penitentiary and interview prisoners (App. 407). Wainwright wanted to deny the request, but his superior, Dr. Buchs, the Secretary of the Florida Department of Health and Rehabilitation, ordered him to permit it (App. 407–408). Whitten spent three days at the institution, and a column appeared (App. 408). The column dealt generally with prison conditions as well as making specific allegations about the Florida Penitentiary (App. 409–410). Newspapers within the state became interested, and were also permitted access to the prison (App. 411). Serious disciplinary problems resulted "[u]ntil the situation got to be complete chaos and Dr. Buchs decided maybe we ought to revert back to the policy we had through the years" (App. 411–412). Further problems followed, and a serious disturbance erupted in which forty-two people were injured (App. 412).

C. *The federal prison system needs a uniform policy on interviews with inmates.*

Another important justification for the Bureau of Prisons' prohibition against inmate interviews is the

importance of treating all inmates equally. As Director Carlson explained, in a colloquy with the court and counsel (App. 451–452):

> The Court: I haven't heard yet—and I wanted to give you the opportunity, because there isn't any evidence being submitted to me—as to the need of a total exclusion * * *.
>
> The Witness: Your Honor, as I have attempted to explain, and apparently have been unsuccessful, I feel if we did permit the press to interview institutions * * * this would then raise the issue in all our other institutions * * *.
>
> * * * * *
>
> Q. * * * Do you feel that there is a need, across the board, in all areas, to treat all inmates incarcerated in your institutions, as far as possible, equally?
>
> A. Very definitely, I feel that is one of the very basic tenets of sound correctional administration.

The record contains the Director's expert judgment that uniformity of treatment of all inmates within both a particular institution and within the entire federal prison system, is important to sound penal administration.

1. A UNIFORM POLICY WITHIN A PARTICULAR INSTITUTION

As explained above, giving prison officials the discretion to grant or deny inmate interviews is likely to lead those officials to deny interviews to inmates whom they believe are hostile to the administration and likely to cause trouble. If, as is likely to be the case, a significant number of the inmates denied interviews for that reason are members of minority groups, they and

their groups probably will believe that they have been subjected to unfair racial or ethnic discrimination. This, in turn, would be likely to lead to severe morale and disciplinary problems within the institution.

Equality of treatment among inmates is a basic tenet of sound penal administration (*see supra*, p. 20). This concept, however, does not cover differences in treatment required by correctional needs, which are essential. As Director Carlson explained: "In terms of the correctional needs of the offender, I would hope that we differentiate based upon the needs of the offender for particular types of correctional treatment. In terms of over-all treatment, in terms of the inmate, what his economic status is, what his socio-economic class may be, what his prior position may be, what his race or religion may be, I hope we do treat them all equal. This is the basic tenet I was referring to" (App. 455).

Members of minority groups who are denied press interviews because of the potential for disruption that such interviews create are unlikely to appreciate the distinction Director Carlson drew. To them, such denials are likely to appear as additional instances of unfair treatment by the prison authorities, and to exacerbate any existing hostile feelings they have toward the prison and its administration.

3. A UNIFORM POLICY WITHIN THE FEDERAL PRISON SYSTEM

Director Carlson, although recognizing that there were some institutions within the federal prison system where interviews would not be a problem (App.

217), nevertheless concluded that a uniform policy is necessary:

> Because of the fact that we have inmates that are transferred from one institution to another, from Lewisburg to Danbury, from Danbury to McNeil Island, in Washington. We have a great deal of transfer of inmates because of geographic residence. We have inmates that go out and back into a different institution on new federal offenses or related to a parole violation. We thought we had to have a policy that would be applicable at Lewisburg as well as at La'Tuna, Texas. We couldn't differentiate because the inmate happened to be at a different institution at a particular time. [App. 213.]

'The Bureau of Prisons' concern here is in part the same as that which requires a uniform policy within an institution. 'The inmates view the entire federal prison system as one and they know about any differing policies at other institutions within the system. 'Thus inmates at a maximum security institution, where interviews would either generally or always be denied,' will feel discriminated against. 'The situation would become particularly acute where prisoners are transferred from less to more stringent institutions, where inmate press interviews are less likely to be permitted; the unavailability of such access to the media would further increase the transferred prisoners' anger and

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'The district court stated, in a colloquy with Director Carlson, that "You wouldn't be required [under the order] to permit any interviews in maximum security institutions" (App. 400). In *Seattle-Tacoma News Guild, Local 82 v. Parker*, 488 F. 2d 1002, the Ninth Circuit specifically upheld the Bureau's interview ban as it applied to McNeil Island federal penitentiary, a "maximum security" facility.

hostility and make them more difficult to handle in the new institution.

Finally, there is the serious problem of supervising a discretionary policy in the far flung federal prison system. As indicated above, *supra*, pp. 23–28, supervising such a policy is difficult. The line between denial of an interview made in good faith to prevent "trouble" and one made in bad faith to prevent unfavorable publicity or disclosure of improper practices is thin indeed. Under whatever standards and policies the Bureau of Prisons may establish to guide its personnel, it would be a difficult, complex, and time-consuming task to insure that those standards and policies are being properly administered.

Peter B. Benninger, who had adopted a policy of discretionary interviews within his state system and who considered it desirable, recognized that the different structure of the federal prison system would justify a uniform policy. "I think [a discretionary policy] * * * would be less successfully implemented. I think in the Federal Bureau of Prisons, where you have 32 different institutions, you would have some problems. You have got inmates that are going to be assigned from one institution to another, who might have a practice at one location and not the same practice in another, and you have got distances in the Federal Bureau of Prisons that we don't have, of 3,000 miles rather than a couple of hundred miles" (App. 1000).

II

THE BUREAU OF PRISONS' REFUSAL TO PERMIT IN-MATE PRESS INTERVIEWS IS CONSTITUTIONAL

A. The Director of the Bureau of Prisons acted within his discretion in concluding that sound penal administration requires the denial of inmate press interview

1. THE DIRECTOR HAS BROAD DISCRETION IN OPERATING THE PRISON SYSTEM AND THE COURTS EXERCISE ONLY LIMITED REVIEW OF HIS ACTIONS

The formulation of the public information policy of the Bureau of Prisons is a matter within the authority of that Bureau. The control and management of federal prisons has been vested by Congress in the Attorney General of the United States, and he has the authority to promulgate rules covering the activities of federal prisoners and to "provide for their proper government, discipline, treatment, care, rehabilitation, and reformation." 18 U.S.C. 4001. Under the direction of the Attorney General, the Bureau of Prisons has charge of the "management and regulation" of all federal prisons and has the duty to:

> Provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States [18 U.S.C. 4042.]

Courts have long respected both the broad authority of the Bureau of Prisons and the expertise it has gained from its long experience in administering the federal prisons. Thus, courts have recognized that "[t]he responsibility for the supervision of * * * [fed-

eral penal] institutions and the inmates is placed upon the Attorney General. Courts have uniformly held that supervision of inmates of federal institutions rests with the proper administrative authorities and that courts have no power to supervise the management and disciplinary rules of such institutions." *Sutton v. Settle*, 302 F.2d 286, 288 (C.A. 8), certiorari denied, 372 U.S. 930. See also (state institutions), *Cruz v. Beto*, 405 U.S. 319, 321; *Nastre v. McGinnis*, 331 F.2d 908, 911-912 (C.A. 2), certiorari denied, 379 U.S. 892 (it is not "the business of the Federal Courts to work out a set of rules and regulations" to govern prison conditions) *Nastre v. McGinnis*, 442 F.2d 178, 180 (C.A. 2) (*en banc*), certiorari denied *sub nom. Oswald v. Nastre*, 405 U.S. 978. Matters relating to the internal operation of the prison system are committed to the discretion of the prison officials, and court review of their actions necessarily is extremely limited. The formulation of proper public information standards and procedures is one of those functions where the courts should largely defer to the expertise of prison administrators.

Bureau of Prisons Policy Statement No. 1220.1A, described in Part I, is a regulation governing the management of the federal prisons, and, as such, it is well within the authority of the Bureau under 18 U.S.C. 4001 and 4042. This policy, regulating press access to prisons, represents an attempt by the Bureau to allow the press to gather information about federal prisons without endangering the security of these institutions or hampering the rehabilitation process. "The purpose [of this policy statement] is to protect First Amend-

ment rights of inmates, within the constraints of sound institutional management" (§ 1, Pet. App. D, 40). As the Ninth Circuit concluded in upholding the Bureau's policy against constitutional attack, "the interview ban is reasonable action within the scope of the wide discretion of the prison administrators * * *." *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, 480 F. 2d 1062, 1066.

The broad discretion of the Attorney General in operating the federal prison system under this statutory authority is comparable to his wide authority to exercise the plenary congressional power to exclude aliens, which this Court repeatedly has recognized, most recently in *Kleindienst v. Mandel*, 408 U.S. 753. In *Mandel*, the Court declined to look behind the Attorney General's "exercise of that discretion" to exclude an alien for a "facially legitimate and bona fide reason" (408 U.S. at 770) even though the exclusion interfered with the desire of American citizens to communicate in person with him. Similarly, in the present case, where the Director of the Bureau of Prisons has given a "facially legitimate and bona fide reason" for prohibiting inmate press interviews, the courts themselves should not attempt to determine the wisdom or suitability of that judgment.

C. THE DIRECTOR DID NOT ABUSE HIS DISCRETION IN BANNING INMATE PRESS INTERVIEWS

A. Permitting such interviews would cause serious problems in the prison system.—We have explained in Part I, *supra*, the reasons that led the Director of the Bureau of Prisons to conclude, after considering alternative proposals, that an outright prohibition upon

press interviews with federal prison inmates was necessary for the proper administration of the federal prison system. In evaluating that justification, however, it is necessary to take account of two additional considerations which further support the Director's decision: that the press has alternative means of obtaining information about prisoners and prison conditions, and that the denial of interviews with inmates does not discriminate against the press.

b. *The press has alternative means of obtaining necessary information about prisoners and prison conditions.*—Although Bureau of Prisons Policy Statement No. 1220.1A does not permit the press to interview individual inmates, it does provide the press with full opportunity to learn about prison conditions and prisoner grievances. Under the Policy Statement, press representatives may visit, inspect, and photograph federal prisons (§§ 4b(5), 4b(7)); inmates are permitted directly to inform press representatives of prison conditions and prisoner grievances through sealed, uninspected mail written and promptly delivered to any press representative (§ 4b(1)); press representatives are permitted to initiate correspondence with inmates of their choosing or to engage in a written dialogue by following up on mail received from inmates by writing to particular inmates in letters which are inspected only for contraband or matters inciting illegal action (§ 4b(2)); and prison officials are required to "give all possible assistance" to press representatives "in providing background and a specific report" on inmate complaints (§ 4b(12)).

In addition, Bureau regulations permit inmates to bring prison conditions and inmate grievances to pub-

ly attention through sealed, unsuspected mail sent to attorneys, judges, Congressmen, the Director of the Bureau of Prisons, the Board of Parole, and other executive officers; inmates may receive letters from attorneys which are inspected solely for contraband; public officials having supervisory functions with respect to federal prisons, including judges and congressmen, are permitted to interview individual inmates; and inmates may receive visits from members of their immediate family, other relatives, friends, associates, and special visitors such as clergymen, former or prospective employers, sponsors, and parole advisors.

Moreover, since the inmate population of the Bureau of Prisons is constantly turning over, paroled and released inmates with recent prison experience are always available to the press.[1] *Finally, employees of the Bureau of Prisons are available to the press, and the actions of the Bureau of Prisons are subject to review in congressional budget and oversight hearings. The policies and operations of the Bureau of Prisons and its institutions are not immune from press scrutiny or public view.*

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[1] *We are informed by the Bureau of Prisons that approximately one-half of the prison population on any one day will be released within the following 12 months. The average population is 23,000, of whom approximately 12,000 are released each year.*

[2] *In the amicus brief filed in the companion case of Pell v. Procunier, No. 73-918, respondents argue that:*

"[The] democratic process has not been at work in the prison context because prison officials customarily have denied the press an opportunity to present to the public a full picture of prison life, including the views of inmates obtained through in-depth interviews. Only when prison authorities remove the [bars] they have erected to stop the free flow of information to

Although respondents allege that there was "a virtual blackout of news about events and conditions" at Lewisburg and Danbury federal penitentiaries (App. 5), the record shows that respondent Ingalls was able to obtain extensive information about conditions in these institutions by using the procedures discussed above. He testified that he learned of the work stoppages at Lewisburg and Danbury, and of claims of mistreatment of inmates, through correspondence from inmates," correspondence from attorneys representing inmates, "sources on Capitol Hill," and other sources such as former inmates (App. 88–89, 95). Although Ingalls was not permitted to follow up these reports through the particular technique he desired—the confidential interview—the record shows that at both Lewisburg and Danbury the wardens "welcomed" him; invited him to "walk

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the public, will the tides of prisoner grievances be channeled away from the courts, and perhaps from outbreaks of violence, and into the political process where they belong. Thus this case presents an important opportunity for this Court to help activate the political process on issues of penal reform by removing an artificial and arbitrary barrier to an informed citizenry." [Brief of the *Amici Curiae* Washington Post Company, *et al.*, p. 14.]

The record in this case shows that the supposed "ban" is imaginary.

"Warden Alldredge of Lewisburg testified that copies of the Bureau's Policy Statement approving inmate correspondence to the press were "placed in each quarters"; that inmate mail to the news media is "placed in a Government franked envelope" without being "read or inspected in any way"; that an inmate may "obtain the assistance of a fellow inmate in composing a letter to the news media"; and that after the revised Policy Statement went into effect, there was a "significant amount of such correspondence" (App. 180–181, 183). Warden Norton of Danbury testified similarly (App. 201–202, 204).

around and inspect the prisons," including the punitive segregation unit; and informed him that he could converse briefly with inmates he might encounter (App. 90-91, 93, 105-109, 111-114, 116-117). Bagdikian testified that he did, in fact, meet with a group of randomly selected inmates at Lewisburg during which he discussed the strike (App. 91-92, 115). These inmates, he stated, "gave their impressions and some individual experiences" (App. 115). Bagdikian also testified that he did "tour, walk through the institution" at Danbury "and did stop a prisoner at random, I did in fact talk about the strike; and they did not stop me" (App. 113).

In sum, although the Bureau does not permit the press to interview individual inmates chosen by the press directly, it does provide extensive alternative methods for communication between the press and prisoners that enable the press to obtain detailed and comprehensive information about conditions inside the prisons.[28] The Bureau of Prisons has not attempted to cut off the flow of information from inside the prisons to the press, but to the contrary has endeavored to provide the maximum flow that in its expert judgment is consistent with the minimum needs of sound prison administration.

c. The denial of interviews with inmates does not discriminate against the press.—The court of appeals stated (Supp. Pet. App. F, 6):

> The Bureau's policy governing press interviews differs significantly from that controlling

[28] In *Seattle-Tacoma Newspaper Guild, Local 82 v. Parker*, *supra*, the Ninth Circuit emphasized the existence of this "extensive access" in upholding the Bureau's policy, 480 F. 2d at 1067.

> the visitation rights of other persons. In general, inmates' families, their attorneys, and religious counsel are accorded liberal visitation privileges. Even friends of inmates are allowed to visit, although their privileges appear to be somewhat more limited. The testimony suggests that the federal institutions follow a rather liberal policy of granting visitation privileges whenever possible.

The court concluded that because friends, relatives, clergy and lawyers are allowed to visit, and reporters are not, there is discrimination against the press (Supp. Pet. App. P. 11):

> Restrictions that single out members of the news media and limit their access more grudgingly than the right granted the public at large should be examined with care and upheld only where the differential treatment is in response to an identified evil associated with press attendance.
>
> The inquiry in the present case does not end with the Government's assertion of the truism that prisons are institutions where public access is generally limited. Appellees do not seek *carte blanche* rights freely to enter federal institutions whenever they wish and to converse with any person of their choosing. Rather, they say that they should be afforded essentially the same limited rights granted the public generally—the right on occasion to enter and engage in private interviews with consenting inmates.

The "public generally," however, has no right to "enter and engage in private interviews with consent-

ing inmates." Members of the press, like the public generally, may visit the prison to see friends there. What they seek is not the right to talk to friends, but to talk to any inmate for purely professional reasons. In terms of corrections policy, an inmate's family, friends and religious counsel facilitate the rehabilitation process by giving the inmate emotional support and by "motivating him toward positive aspirations" (Bureau of Prisons Policy Statement No. 7300.4A). An inmate's lawyer must have access to the inmate in order to consult with him. The press serves neither of these functions. Instead of facilitating the rehabilitation process, the Bureau of Prisons believes, as has been discussed at length in Part I, that personal press interviews may impede it."

Not only does the Bureau of Prisons not discriminate against the press, it accords the press a preferred position. The press is one of the few recipients of uncensored mail from prisoners. The press is one of the few groups entitled under Bureau of Prisons policy to visit prison facilities. Respondents seek not equality of treatment, but a further extension of the special privileges they already have.

"Plaintiff submitted a proposed finding of fact to the district court that such interviews "are not likely to be a significant factor in the development of disturbances in federal penal institutions" (Plaintiff's Proposed Finding 46; Pet. App. V, 64-65). The district court did not accept that finding (Pet. App. B, 36).

B. THE DENIAL OF INMATE PRESS INTERVIEWS DOES NOT VIOLATE THE FIRST AMENDMENT

1. Government action does not violate the First Amendment merely because it does not facilitate the press's performance of its functions to the maximum extent

The decisions of this Court teach that otherwise valid government action is not invalidated merely because it makes more difficult either the obtaining of information by the public or the performance by the press of its functions. In *Zemel* v. *Rusk*, 381 U.S. 1, suit was brought to compel the Secretary of State to validate a passport for travel to Cuba. Plaintiff claimed that the purpose of his proposed trip was "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen." 381 U.S. at 4. He argued, *inter alia*, that the Secretary's refusal to validate his passport violated his First Amendment right to information about the Government's policy toward Cuba. The Court rejected this argument and held that no such First Amendment right was involved. Speaking through Chief Justice Warren, the Court said:

> We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determining whether appellant has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the

> Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which would not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. *The right to speak and publish does not carry with it the unrestrained right to gather information.* [381 U.S. at 16–17, emphasis added, footnote omitted.]

In *Branzburg* v. *Hayes*, 408 U.S. 665, the Court reaffirmed *Zemel* and further explored its constitutional implications and dimensions. In *Branzburg* newsmen claimed exemption, under the First Amendment, from the obligation to respond to grand jury subpoenas. They asserted that compelled grand jury testimony would constitute a "burden" on news gathering, since if reporters were "forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future." 408 U.S. at 682. Put another way, the newsmen contended that "the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation." 408 U.S. at 693.

While agreeing that "news gathering is not without its First Amendment protections" because "with-

out some protection for seeking out the news, freedom of the press could be eviscerated," 408 U. S., at 707, 681, the Court held that the First Amendment was not "abridged" by the requirement that members of the press respond to grand jury subpoenas. One of the bases for this holding was the Court's conclusion that "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen," 408 U. S., at 693.

The Court in *Branzburg* thus recognized that legitimate government policy which may not provide the press with optimum conditions for performing its news gathering efforts does not on that account "abridge" the "freedom of the press." As the Court in *Branzburg* noted:

> Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant's fair trial before an impartial tribunal. [408 U. S., at 684–685.]

Limitations upon the right of access of the news media to judicial proceedings have long been accepted, even though such limitations may make it more dif-

suit for the media to obtain and distribute to the public the fullest information about such proceedings. For example, there is little doubt that full television coverage of an important trial would give the public a more graphic, more accurate and more complete idea of what happens than a mere written or verbal description of the events. But because of the threats that such coverage poses to a fair trial, ordinarily television coverage of such proceedings is not permitted. *See Estes v. Texas*, 381 U. S. 532. Similarly, photography ordinarily is not permitted in American courts, yet photographs of the participants in the courtroom and of dramatic moments in the trial would enable the press to give a much better picture of the trial and its atmosphere than a written description, no matter how well done. We trust, however, that respondents will not seriously contend that such limitations upon the ability to photograph or televise the actual proceedings violate First Amendment rights.

Respondents are not seeking to gather news on "streets, sidewalks, parks, and other similar places * * * so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Food Employees v. Logan Plaza*, 391 U. S. 308, 315. Rather,

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[1] Indeed, in recent years the practice has developed of permitting artists to attend the courtroom proceedings and to draw sketches of the participants and of dramatic moments in the trial, and thus to give the public some pictorial representation of what transpired.

respondents seek to gather news in federal prisons, which "traditionally" are not "open to the public." *Adderley v. Florida*, 385 U.S. 39, 41. In such a case, "where property is not ordinarily open to the public * * * access to it for the purpose of exercising First Amendment rights may be denied altogether." *Food Employees v. Logan Plaza*, *supra*, 391 U.S. at 320. As Mr. Justice Black stated in *Cox v. Louisiana*, 379 U.S. 536, 578, the First Amendment bars restrictions on "speech, press, and assembly where people have a right to be for such purposes" (emphasis in original). The press, we submit, has no absolute constitutional right to be in the prisons merely because it believes that such presence will aid it in its news-gathering function.

2. The denial of press interviews with inmates does not unconstitutionally abridge the freedom of the press

Unlike many of the cases in which this Court has considered broad issues involving the right of the press to publish and circulate free from government control,[11] the constitutional issue here is much narrower. There is no claim that the Bureau of Prisons has attempted in any way to prevent respondents or

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[11] *E.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (injunction against publication); *Time, Inc. v. Hill*, 385 U.S. 374 (penalty on publication in form of damage award); *Garrison v. Louisiana*, 379 U.S. 64 (criminal libel); *New York Times Co. v. Sullivan*, 376 U.S. 254 (libel); *Grosjean v. American Press Co.*, 297 U.S. 233 (tax on circulation); *Near v. Minnesota*, 283 U.S. 697 (injunction against publication).

other members of the press from freely publishing or circulating any reports concerning prison conditions and prisoner complaints. The question here is whether the First Amendment gives the press the right to use a particular technique of news gathering—the confidential personal interview—inside the walls of federal prisons."

We submit that, in view of the special justifications for the Bureau of Prisons' refusal to permit such interviews and the fact that numerous other sources of information about the federal prison system are available, the press does not have that right.

The First Amendment is one of the vital bulwarks of our national commitment to intelligent self-govern-

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*"The issue of the First Amendment right of inmates is not present in this case but is present in the consolidated case of Pell v. Procunier, No. 73-751. It has long been recognized that: "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285. See also Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971), certiorari denied sub nom. Oswald v. Sostre, 405 U.S. 978; McDonough v. Director of Patuxent, 429 F.2d 1193, 1195 (4th Cir.). Thus the issue in the inmate case is the same as the issue here: do the "considerations underlying our penal system" support a prohibition of personal interviews. Whether the "right" in issue here originates, as a conceptual matter, with the press or the inmate, the practical answer must be that the prohibition can be no greater in the one case than the other. Relevant is the observation that although "[t]he Attorney General and other officers in the line of authority over penal institutions do not have the power arbitrarily to deny a prisoner communication with the outside world, * * * they do have wide powers of control over such communication." Douglas v. McKinney, 291 F.2d 711, 712 (4th Cir.).*

ment. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965). Inherent in the purpose of the First Amendment is "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences * * *." *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 390. The press, by seeking and reporting news, plays a crucial role in the fulfillment of this right of the public to information about the affairs of state, since no individual has the time or the resources to gather all the information necessary to form intelligent opinions concerning the functioning of government.

The First Amendment protects and maintains the freedom of the press by preventing government interference ("Congress shall make no law * * *"); it bars government interference with publication in order "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail * * *." *Red Lion*, *supra*, 395 U.S. at 390. The First Amendment, however, is not defined by the convenience of the press. It does not obligate the government affirmatively to assist the press to improve its news gathering or news distribution techniques and methods or to increase the volume or quality of the information it furnishes to the public.

If the First Amendment is construed to give "the press" a right to interview prisoners, there will be serious and difficult questions of interpretation and

application. The "press" today is not a clearly defined identifiable group, but a vague and broad concept. In addition to working journalists, radio and television reporters and commentators and recognized magazine authors and writers of books who work full time at the profession, there are many individuals who occasionally write and publish articles or books, but who are not customarily thought of as members of the "press."

For example, a professor of sociology doing research for a book or article on prison conditions which he hopes to publish may wish, as part of his research, to interview prisoners. Similarly, a practicing lawyer who publishes an occasional article may seek the same privilege. Perhaps a "reporter" for an "underground" newspaper or magazine, who does not have the usual press accreditation, wishes to interview prisoners in the hope of obtaining some sensational charges and claims that could form the basis for an article for his publication.

It is clear from the record that granting confidential prisoner interviews to every person with a plausible claim of an intent to write, or perhaps even to give a public address, would create an intolerable situation for the federal prison system. The court of appeals' decision, therefore, would require the Bureau of Prisons, and ultimately the federal judiciary, to determine which prospective writers and speakers have First Amendment rights of access and which do not. That is a path so fraught with constitutional dangers that the law ought not to enter upon it.

This Court adverted to the problem when, in re-

jecting a claim that newsmen should be given a special privilege against compulsory testimonial disclosure, it stated in *Branzburg* v. *Hayes*, *supra* (408 U.S. at 703-704):

> We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

Thus, the consequence of recognizing a First Amendment right of the "press" to interview prisoners could be a much broader and more serious interference with the proper operation of the federal prison system than seems likely to result from permitting the Washington Post and one of its reporters to conduct the interviews they are here seeking.[11] It would also involve the courts on an ever-increasing scale in de-

[11] The Bureau of Prisons in its Policy Statement has stated that it will permit uncensored mail communication with prisoners by "a newspaper entitled to second class mailing privileges; a magazine or periodical of general distribution; a national or international news service; a radio or television network or station" (Policy Statement No. 1220.1 A, § 1a, Pet. App. A, 931). This, of course, is an objective standard, which does not require Bureau of Prisons officials to make subjective judgments whether a particular individual is a member of the "press"—or, indeed, whether communication with a particular prisoner would have an adverse effect within the prison.

termining the rights of the press to interview prisoners."

The scope of the written media is not the only problem. Movie and television "journalists" can make a similar claim. Surely if an interview is the most effective technique for the written journalist, the television camera at the interview is the most effective technique for the television journalist. The record shows that some prison administrators have admitted television cameras to their institutions, without, in their opinion, ill effect (New York City: App. 128–129; Massachusetts: App. 340). Does this mean that the television cameraman has now acquired a constitutional right of access?

"Cf. *McMillan v. Carlson*, C.A. 1, No. 74-1021, decided March 20, 1974. In that case "a recognized author" with "a contract with an established publisher to write a biography of James Earl Ray, the convicted assassin of Martin Luther King," sought to interview Ray's brother, who was a prisoner in a federal penitentiary. McMillan conducted correspondence with him, but the district court "on adequate evidence" found that "plaintiff has a reasonable belief that this is inadequate and that a personal interview would be more productive" (slip op. 1-2). The Bureau of Prisons refused the interview. In holding that the district court decision that "denying access in this case would be unnecessary and unreasonable" is "supportable," the court stated (slip op. 6-8): "Assuming, as we do, that if any access is ever to be permitted, the hard core of allowed access would include a previously established author, under contract with a reputable publisher, wishing to interview a consenting prisoner who reasonably may be expected to contribute information on a subject of widespread interest, we hold that this case is within that core." This holding presumably means that the court is prepared to judge degrees of professionalism in assigning First Amendment rights to persons claiming to be members of the press.

Any approach which requires that the virtues of each particular journalistic technique be balanced against the reasons for limiting its use presents further serious difficulty. Such an approach forces the courts to decide what journalistic techniques are "good" and what techniques are "bad," in itself a government determination of how the press should pursue its objectives."

Critical to the decision of the court of appeals was its conclusion that interviews are "essential to effective news reporting in the prison environment" (Supp. Pet. App. F, 14). But Arthur Liman, General Counsel of the New York State Special Commission on Attica, testified on the basis of 1000 inmate interviews conducted by the Commission that *private* interviews with inmates are necessary to get the truth, and other portions of the record make it clear that the press interviews sought here will not be private (App. 185-186, 222, 436). Liman was the only witness who had actual experience conducting private interviews with inmates. "I should add that the basic problem in conducting interviews at a prison is that it is a society in which inmates face sanctions and rewards not just from the administration but from other inmates, and that when an inmate sees you in private, he will tell you things about the administration that may not only be unfavorable but may in many cases be favorable. * * * [He then continues

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"The ban of the Bureau of Prisons is based only on considerations of penal administration and does not reflect an effort by the Bureau of Prisons to determine how journalists can most effectively perform their function.

with other examples of the differences in public and private statements.] (App. 291–293).

The district court (Pet. App. B, 30) and the court of appeals (Supp. Pet. App. F, 14, n. 13) relied heavily on this testimony in concluding that there was an essential need for press interviews. The Commission interviews, however, were conducted in privacy; indeed the total of 1000 interviews virtually guaranteed anonymity. The record shows that press interviews, on the other hand, will, in terms of the life of the institution, be public interviews even if the inmate is not named (App. 185–186, 222, 410). (Respondents here, of course, claim the right to name the interviewee, Complaint Prayer for Relief, Par. 8, App. 7). Lyman's testimony thus indicates that the interviews the respondents seek to conduct are likely to result in misleading rather than accurate reports. It illustrates the inadvisability of the courts becoming enmeshed in the process of deciding how much "weight" or "value" should be put on a particular journalistic technique in order to "balance" it against a particular justification.

This Court referred to a similar problem when considering the claim of privilege advanced in *Branzburg*.

> In each instance where a reporter is subpoenaed to testify, the court would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the in-

> formation elsewhere? Is the official interest sufficient to outweigh the claimed privilege?
>
> Thus, in the end, by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. [408 U.S. at 705-706.]

Similarly, here, every journalist is entitled to pursue those journalistic techniques he finds useful (without regard to whether his view is shared by his peers). The courts should not become involved in giving constitutional sanction to those techniques considered essential only by the established members of the profession.

To recapitulate: The Director of the Bureau of Prisons had a reasonable, indeed, a compelling, basis for his conclusion that permitting individual inmate interviews would have a seriously adverse effect upon prison operations. The procedures the Bureau has adopted, which permit extensive uncensored communication between the press and prisoners, are considering all the circumstances, consistent with the First Amendment rights of the press. The latter, we sub-

mit, does not have any constitutional right to conduct face-to-face interviews with individual prisoners.

The rule the district court and the court of appeals have announced, under which prison officials and the courts would be required to decide a host of difficult factual and constitutional issues in considering each interview request, would improperly require that a problem best left to the flexibility inherent in informed administrative discretion be addressed only within the framework of constitutional adjudication. As this Court observed in the context of the congressional scheme regulating access to the airwaves, "courts should not freeze this necessarily dynamic process into a constitutional holding." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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